No. 96-184

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LIFE INSURANCE COMPANY OF GEORGIA,

Petitioner,

v.

DAISEY L. JOHNSON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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REPLY MEMORANDUM

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REPLY MEMORANDUM

Petitioner Life Insurance Company of Georgia ("Life of Georgia") respectfully files this memorandum in reply to respondent's brief in opposition to certiorari.

In the Petition ("Pet."), Life of Georgia demonstrated that at the very least, the Court should grant *certiorari*, vacate the judgment and remand this case for further consideration in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). Life of Georgia also showed that the Court should grant plenary review to decide whether the punitive damage award in this case violates the Due Process Clause. Although this Court's decision in *BMW* was not released until almost a month after the Alabama Supreme Court issued its opinion on applications for rehearing in this case, respondent contends that the Alabama court "faithfully applied" the standards set forth in *BMW*. Moreover, although the Alabama Supreme Court in this case expressly and unequivocally rejected Life of Georgia's argument that the punitive damage award violated the Due Process Clause, Respondent's Brief in Opposition ("Opp.") nonetheless unaccountably argues at length that this Court lacks jurisdiction to review three of the four due process questions presented in the Petition and that Life of Georgia otherwise waived its constitutional claim. Opp. at 1, 16-23. Life of Georgia will address each of the arguments in turn.

1. Little needs to be said about respondent's hyperbolic reinterpretation of the factual background of this case, other than to point out that respondent, in her strenuous efforts to characterize Life of Georgia's conduct as "reprehensible," fails to dispute -- because she cannot -- that the sale of Medicare Supplement policies to tens of thousands of older

Americans was a legitimate, lawful activity that yielded tremendous social benefits in all but a few isolated cases. Life of Georgia further notes the continuing confusion in respondent's argument as to why Life of Georgia should be held liable. Respondent first concedes that agent Barbara Holt "knew that it was illegal and against company policy to sell the supplement policy to Ms. Johnson if she was on [M]edicaid," Opp. at 3, and does not deny the undisputed testimony that Ms. Holt asked respondent whether she was on Medicaid, *see* Pet. at 11-12 & n.4. Yet, respondent contends that Life of Georgia should be liable because it did not provide adequate training to Ms. Holt and should have known that Ms. Holt was "incompetent." Opp. at 4. There was absolutely no evidence at trial (nor is any offered by respondent now) that Ms. Holt's purported lack of competence caused her to sell a Medicare Supplement policy to respondent. Indeed, after the completion of evidence and before submission of the case to the jury, respondent withdrew her negligent training claim.

2. Respondent's assertion that the Alabama Supreme Court in this case "faithfully applied the three 'guideposts' announced in *BMW*," Opp. at 15-16, is fanciful. The Alabama Supreme Court undertook in this case exactly the same form of review that it applied in its review of the punitive damage award at issue in *BMW*. And it arrived at an indistinguishable result: imposition of a multi-million dollar penalty that is not moored to any standard or benchmark. In both cases, quite simply, the Alabama court pulled a number out of the air. As it already has done with three similarly postured cases from Alabama, *see* Pet. at 8 n.3, this Court should remand for further consideration.

Respondent's attempts to reshape the decision of the Alabama Supreme Court to reflect this Court's *BMW* guidance is unpersuasive. For example, in asserting that Life of Georgia's conduct is so "reprehensible" that it

deserves a $5 million penalty in this case (in addition to the $1 million imposed for the same conduct in *Foster v. Life Ins. Co. of Georgia*, 656 So. 2d 333 (1994)), respondent emphasizes that Life of Georgia's conduct hurt "low income, elderly individuals." Opp. at 14. In doing so, respondent focuses on her economic status and generalizes her case. What she fails to note, as did the Alabama Supreme Court, is that the Medicare Supplement policies helped thousands of lower income, elderly individuals. *See* Pet. at 10-11. Moreover, what was at issue in this case was Life of Georgia's sale of a Medicare Supplement policy to one individual, respondent, not the propriety of such policies. More to the point, the Alabama Supreme Court did not articulate any "standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damage awards." *BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring).

Respondent not surprisingly attempts to elide the second *BMW* factor -- proportionality -- which clearly was not considered by the Alabama Supreme Court and which clearly compels a substantial reduction of the punitive damage award. *See* Pet. at 12-13. In particular, respondent offers no justification to support a punitive damage award that is 20 times "mental anguish" damages that are themselves grossly excessive, nor does she attempt to justify the fact that the punitive damage award is 1,600 times respondent's economic loss, other than to say in effect that Life of Georgia's conduct is so reprehensible that proportionality should not matter. *See* Opp. at 14. The point in looking to proportionality, *in addition to reprehensibility*, is to have a *separate* basis for assessing the excessiveness of an award. To justify a "breathtaking" 1,600:1 ratio by pointing to alleged reprehensibility is to read the proportionality section out of the Court's *BMW* analysis.

Respondent's claim that the Alabama Supreme Court "utilized this Court's third 'guidepost' announced in *BMW* in remitting the award to $5 million," Opp. at 14, is nonsensical. Nothing in the Alabama Supreme Court's opinion uses any legislatively established sanction as a benchmark for arriving at the $5 million penalty imposed in this case. Nor could the Alabama court have found any legislative justification for such a steep fine, because there simply is none. Indeed, respondent herself "does not dispute that the monetary comparisons are wide," but falls back "upon the objective criteria presented at trial," Opp. at 15, whatever that means.

It simply is impossible to credit respondent's assertion that the Alabama Supreme Court "faithfully applied the three 'guideposts' announced in *BMW*." Opp. at 15-16. The Alabama court did not have the benefit of the *BMW* decision before it assessed millions of dollars in punitive damages, and it did not betray any prescience that this Court would strike down the award that the Alabama court had assessed in *BMW*, which was a product of the same procedures that it used in this case. *Cf.* Pet. App. at 186a (Maddox, J., dissenting from denial of stay) ("In *BMW*, the Supreme Court found that this Court did not exercise its discretion reasonably and that the constitutional protection of due process of law was not satisfied. I think the Court is guilty once again."). This Court should remand to give the Alabama Supreme Court the opportunity in reality to apply *BMW* "faithfully."

3. Respondent attempts to avoid plenary review in this Court, not by any cogent dispute on the merits, but by arguing that Life of Georgia did not preserve its claim that the punitive damage award violates the Due Process Clause. This argument is utterly without basis in the record, which is replete with assertions by Life of Georgia of its due process claim. *See* Pet. App. at 155a (asserting in the

Answer that the "imposition of punitive damages in this case would violate the Due Process Clause"); 156a-157a (asserting in the Answer nine separate ways in which a punitive damage award would violate the Fourteenth Amendment, including that "[t]here is no limit placed on the amount of the award," "[t]here are no provisions for clear and consistent appellate standards of review" and "[t]he standards of conduct upon which punitive damages are sought are vague and ambiguous"); 159a-166a (arguing in the post-trial brief that the Alabama punitive damage system "violates the Due Process Clause of the Fourteenth Amendment" for a variety of reasons, including that due process requires "that 'a person of ordinary intelligence' have fair notice as to what the law commands or forbids"); 166a-170a (arguing in the post-trial brief that the award in this case is "grossly excessive" in violation of "the Due Process Clause of the Fourteenth Amendment"); 172a-181a (arguing on appeal that the award in this case "contravenes . . . the Due Process Clause of the Fourteenth Amendment" for a number of reasons, including because it "subject[ed] Life of Georgia to punishment for that alleged conduct for the second time").

The Alabama Supreme Court explicitly addressed Life of Georgia's due process claim:

> [T]he due process provisions of the Fourteenth Amendment have been the basis of constitutional challenges where, as in this case, the defendant argues that the award of punitive damages is grossly excessive and fundamentally unfair and therefore contravenes Alabama law and the Due Process Clause of the Fourteenth Amendment. . . . These arguments have been carefully considered by this Court. . . . It is the opinion of this Court that $5

> million is not excessive for punishment and deterrence specific to Life of Georgia, considering all the facts of this case.

Pet. App. at 11a, 37a. This ruling on Life of Georgia's due process claim is fatal to respondent's preservation claims: "There can be no question as to the proper presentation of a federal claim when the [court below] passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959).

Respondent also appears to confuse a due process "claim" with the particular "arguments" made in support of such a claim. Thus, respondents seek support from *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee*, this Court would not consider whether a statute denied substantive due process because "petitioners did not raise a substantive due process *claim* in the state courts, and no state court has addressed such a *claim*." *Id.* at 533 (emphasis added). In this case, Life of Georgia clearly and consistently raised its due process *claim* from the beginning of the litigation through appeal to the Alabama Supreme Court, and that court addressed the due process claim.

To the extent that Life of Georgia has refined and supplemented its due process *arguments* or articulated the due process question with greater specificity in this Court, it is well settled that the "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 197-98 (1899); *see, e.g., Stanley v. Illinois*, 405 U.S. 645, 658 & n.10 (1972) (although the precise issue was not raised in the courts below, the issue could be considered in this Court because it involved the same "constitutional premise raised below" and the "method of analysis [was] readily available to the state court"); *see also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Illinois v. Gates*, 462 U.S. 213, 248 & n.2 (1983) (White, J., concurring in

the judgment) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf . . . of a federal claim be raised and decided below.").

Respondent's various assertions that Life of Georgia did not properly raise objections under state law -- for example, to counsel's opening and closing arguments urging the jury to punish Life of Georgia for out of state conduct -- are irrelevant. *See* Opp. at 16-18. Life of Georgia did not and does not contend that counsel's argument was improper as a matter of Alabama substantive or procedural law, so it had no obligation to object to the argument.[1] Rather, Life of Georgia contends that the punishment imposed -- based as it was in part on Life of Georgia's out of state conduct -- violated the Due Process Clause. This argument regarding the due process claim was fully briefed on the merits in the Alabama Supreme Court and was fairly included in the due process claim as it was raised beginning with Life of Georgia's Answer. *See* Pet. App. at 176a-178a; Opp. App. at 2-4, 6.

4. Respondent makes no argument whatsoever on the merits of Question 2 (extraterritoriality) of the Petition. With regard to Question 3 (duplicative punishment), respondent says only that this case is not a "mass tort" as are the cases cited in the Petition. *See* Opp. at 20. It is interesting that respondent concedes that Life of Georgia has not committed a "mass tort," in light of her explicit claims at trial regarding an illegal pattern of fraud. Nevertheless, the underlying and operative fact is that Life of Georgia was punished twice for the same conduct,

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[1] Similarly, Life of Georgia had no obligation to object to the trial court's oral charge to the jury in order to preserve its due process claim. *See* Opp. at 21-22.

precisely the issue that vexed the lower courts in the cases cited in the Petition. *See* Pet. at 17 & n.7. Thus, this case squarely presents the important issue of the constitutionality of duplicative punishment.

Finally, respondent resists plenary review of the constitutionality of the Alabama punitive damage system on the ground that the Alabama legislature and Alabama Supreme Court have taken steps to try to improve the system. *See* Opp. at 22-23. The woeful reality -- which respondent does not dispute -- is that despite minor changes in the Alabama procedures, the system does not provide defendants with "fair notice . . . of the severity of the penalty," *BMW*, 116 S. Ct. at 1598, that Alabama may impose to punish any given conduct. Respondent makes no attempt to show how the Alabama system as it currently exists provides such notice. In any event, to the extent that the Alabama Supreme Court might recognize that Alabama procedures are inadequate, that Court did not provide Life of Georgia with the benefit of any means designed to correct those shortcomings. This case provides the opportunity for this Court to announce clear, objective and definite procedural standards that restrict the imposition of punitive damages.

CONCLUSION

The petition for a writ of certiorari should be granted and the case either remanded for further consideration by the Alabama Supreme Court in light of *BMW* or set for plenary consideration.

September 13, 1996

Respectfully submitted,

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